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No. 85-1940

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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6/17

TABLE OF AUTHORITIES

Page

Cases:

Choctaw Nation v. *Oklahoma*, 397 U.S. 620 3

Kaiser Aetna v. *United States*, 444 U.S. 164 2

Lewis Blue Point Oyster Co. v. *Briggs*, 229 U.S. 82 2

Scranton v. *Wheeler*, 179 U.S. 141 2

United States v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592 2

United States v. *Rands*, 389 U.S. 121 2

United States v. *Willow River Power Co.*, 324 U.S. 499 2

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In our petition for a writ of certiorari, we explained that the United States' navigational servitude precludes the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation Project has resulted in a compensable taking of instream tribal property. We demonstrated that the court of appeals' contrary conclusion is inconsistent with decisions of this Court interpreting both the navigational servitude and the scope of the Cherokee Nation's instream property interests (Pet. 9-18). In addition, we showed that the question presented here is important because the court's decision would expose the United States to multi-million dollar liability for traditionally noncompensable damages (*id.* at 18-19) and would ultimately upset the settled rules and expectations that govern construction of public navigation projects (*id.* at 19). The Cherokee Nation's brief in opposition has failed to overcome our submission that the court of appeals erred and the question presented warrants this Court's review.

1. The Cherokee Nation argues that the court of appeals reached a correct and uncontroversial result, stating that "[n]o new law is involved here, no conflict of decision is present, and no far-reaching precedent is established in this case" (Br. in Opp. 16). We emphatically disagree. As our petition explains (Pet. 9-14), the court of appeals' decision departs from the settled rule that the United States owes no compensation to parties who claim that the government's navigational improvements prevent or impair the use of property located within the bed of a naturally navigable body of water. This Court has made clear that the navigational servitude precludes compensation for a claimed taking of submerged lands, stating:

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation.

United States v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596-597 (1941) (footnote omitted). See also, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175-176 (1979) (quoting *Scranton* v. *Wheeler*, 179 U.S. 141, 163 (1900); *United States* v. *Rands*, 389 U.S. 121, 123 (1967); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 509 (1945); *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82, 87-89 (1913).

The Cherokee Nation contends that the settled rule is inapplicable here, characterizing it as resting on "distinguishable cases where title passed through states of the union to ultimate riparian owners" (Br. in Opp. 12 (footnote omitted)). However, as our petition explains (Pet. 14-16), the rule applies with equal force in this instance. This

Court's decisions indicate that the navigational servitude does not depend on the source of the claimant's title to submerged lands (see *id.* at 15 & n.12). The Cherokee Nation, like all other owners of land beneath navigable waters, took its riverbed interest subject to the United States' power under the Commerce Clause to regulate and promote navigation (see *ibid.*). Furthermore, and contrary to the Tribe's suggestion (Br. in Opp. 13-14), the United States does not violate its trust responsibilities to the Indian tribes by refusing to pay compensation for impairment of interests that, as a matter of law, are noncompensable (see Pet. 16).[1]

2. The Cherokee Nation also suggests (Br. Opp. 11-12, 16-18) that the issue presented in this case lacks importance sufficient to merit this Court's review. Again, we disagree. This case, even when viewed in isolation, presents an unusually large taking claim. The Tribe, relying on a private appraisal, contends that the government's navigational improvements have resulted in a $108 million loss in the *fair royalty value* of the riverbed (Br. in Opp. 7 n.15). The appraisal, however, uses this figure to reflect the Tribe's claim for damages through *1984*; the appraisal report further states that the Cherokee, Choctaw, and Chickasaw Nations are collectively entitled to *future royalties* of approximately *$140 million every 25 years.*[2]

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[1]As our petition also explains (Pet. 17-18), the Cherokee Nation's present position directly conflicts with its previous representations to this Court in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). In support of its claim to ownership of the bed of the Arkansas River, the Tribe stated that "no matter who holds title to the riverbed, the [Tribe] or the state, the rights and power of the United States are precisely the same" (Cherokee Reply Br. 13-14). The Tribe makes no attempt to reconcile its present position with its past statements to this Court.

[2]See 1 W.R. Holway & Associates, *Arkansas Riverbed Project* 3-1 to 3-3 (Nov. 1984). We have lodged a copy of volume 1 of the appraisal, which sets forth the relevant figures, with the Clerk of the Court. We do not, of course, necessarily agree with any of the estimates or conclusions contained therein.

Furthermore, as we explained in our petition (Pet. 12-14, 18-19), this case represents a significant departure from prior cases interpreting the navigational servitude that, if left uncorrected, could have serious ramifications beyond the present dispute. Although the Cherokee Nation contends that the court of appeals' decision "is unique to the circumstances present in this case" (Br. in Opp. 11), the court's opinion in fact broadly refashions the concept of the navigational servitude to reach its result. See Pet. 12-14.

The Cherokee Nation states it "cannot be concerned with any claims that 'could' be asserted against the government" (Br. in Opp. 17). The court of appeals, sharing this attitude, professed little concern over "[w]hatever other actions our holding might generate * * *" (Pet. App. 15a). We submit, however, that this Court should be concerned by the consequences of this case. For nearly a century, this Court has held that the United States may improve navigable waters free from takings claims by owners of the underlying lands. See Pet. 9-11. This long-settled rule serves to bind all persons and groups within the United States together as one nation and provides both the government and the owners of submerged land with clear guidance in planning their respective activities. The court of appeals' departure from this rule, with its consequent disturbance of legitimate expectations, presents an important federal question warranting this Court's review.

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, it is therefore respectfully submitted that the petition should be granted.

CHARLES FRIED
Solicitor General

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